Supreme Court, U.S.
FILED

981770 MAY 4 - 1999

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

THE STATE OF TEXAS,

Petitioner,

vs.

HEIDI SCHRAMM CONSAUL,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals, Eighth District Of Texas

PETITION FOR WRIT OF CERTIORARI

KAREN L. LANDINGER
Asst. Dist. Attorney
34th Judicial District
201 El Paso County Courthouse
500 E. San Antonio
El Paso, Texas 79901
Telephone: (915) 546-2059 X3212
Fax: (915) 533-5520
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

84PP

QUESTIONS PRESENTED FOR REVIEW

1. Whether an individual who terminates an interview and returns home is in custody pursuant to *Stansbury v. California*, 511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994)?

2. Whether an undisputed break in custody is a relevant factor in determining whether or not an *Edwards* violation has occurred?

3. Whether reiteration of a plea for help in solving the crime ultimately charged constitutes an initiation of contact under *Edwards*?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents..... ii

Table of Authorities iii

Opinions and Orders Delivered..... 1

Jurisdiction of this Court 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 5

Reasons for Granting the Writ 12

Argument 13

Conclusion 21

TABLE OF AUTHORITIES

Page

Federal Cases

California v. Beheler, 463 U.S. 1121, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) 13

Dunkins v. Thigpen, 854 F.2d 394 (11th Cir. 1988) 12, 16

Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) ..... *passim*

McNeil v. Wisconson, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991) 12, 17, 18

McSpadden v. Garraghty, 820 F.2d 654 (4th Cir. 1987) 12, 16

Minnick v. Mississippi, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990) 17

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 14, 15, 17

Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983) 19

Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977) 13

Stansbury v. California, 511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994) 12, 13

United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir. 1987) 12, 16

United States v. Barlow, 41 F.3d 935 (5th Cir. 1994) 12, 16

United States v. Drake, 934 F. Supp. 953 (N.D. Ill. 1996) 12, 16

United States v. Garey, 813 F. Supp. 1069 (D. Vt. 1993) 12, 16

TABLE OF AUTHORITIES – Continued

Page

United States v. Hines, 963 F.2d 255 (9th Cir. 1992) ..12, 16

United States v. Skinner, 667 F.2d 1306 (9th Cir. 1982).....12, 16

Wyrick v. Fields, 459 U.S. 42, 103 S. Ct. 394, 74 L. Ed. 2d 214 (1982)..... 19

STATE CASES

Brown v. State, 661 P.2d 1024 (Wyo. 1983) 13, 17

Commonwealth v. Galford, 597 N.E.2d 410 (Mass. 1992).....12, 17

Gonzalez v. State, 449 So. 2d 882 (Fla. App. 3 Dist. 1984).....12, 16

Keys v. State, 606 So. 2d 669 (Fla. App. 1 Dist. 1992).....12, 16

People v. Davis, 554 N.Y.S.2d 460 (Ct. App. 1990) 13, 17

People v. Dean, 39 Cal. App. 3d 875, 114 Cal. Rptr. 555 (Ct. App. 1974)..... 20

People v. Modesto, 62 Cal. 2d 436, 42 Cal. Rptr. 417, 398 P.2d 753 (1965)..... 19

People v. Riddle, 83 Cal. App. 3d 563, 148 Cal. Rptr. 170 (Ct. App. 1978), *cert. denied*, 440 U.S. 937, 99 S. Ct. 1283, 59 L. Ed. 2d 496 (1979).....19, 20

People v. Scaffidi, 15 Cal. Rptr. 2d 167 (Cal. App. 4 Dist. 1992) 12, 16

People v. Trujillo, 773 P.2d 1086 (Colo. 1989) 12, 16

State in Interest of Wells, 532 So. 2d 191 (La. App. 3 Cir. 1988) 12, 16, 17

TABLE OF AUTHORITIES – Continued

Page

State v. Bymes, 375 S.E.2d 41 (Ga. 1989) 12, 16

State v. Consaul, 960 S.W.2d 680 (Tex. App.-El Paso 1997).....1, 2

State v. Furlough, 797 S.W.2d 631 (Tenn. Cr. App. 1990) 12, 17

State v. Kyger, 787 S.W.2d 13 (Tenn. Cr. App. 1989).....12, 17

State v. Mckenzie, 475 S.E.2d 521 (W. Va. 1996).. 12, 13, 17

State v. Norris, 768 P.2d 296 (Kan. 1989).....12, 16

Tipton v. Commonwealth, 447 S.E.2d 539 (Va. App. 1994).....12, 17

Willie v. State, 585 S.E.2d 660 (Miss. 1991).....12, 17

Wilson v. State, 444 S.E.2d 306 (Ga. 1994).....12, 16

FEDERAL STATUTES

28 U.S.C.A. § 1257..... 3

U.S. CONST. amend. V.....3, 11, 15, 16, 19

STATE STATUTES

TEXAS CODE CRIM. PROC. ANN. art. 38.22 (Vernon 1979)..... 4

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth District of Texas.

OPINIONS AND ORDERS DELIVERED BELOW

The April 10, 1997, opinion of the Court of Appeals, Eighth District of Texas, affirming the trial court's order suppressing all oral and written statements of Respondent, is reported at *State v. Consaul*, 960 S.W.2d 680 (Tex. App. – El Paso 1997). The opinion is reprinted at App. 1.

The April 10, 1997, judgment of the Court of Appeals, Eighth District of Texas, affirming the trial court's order suppressing all oral and written statements of Respondent, is reprinted at App. 18.

The June 27, 1996, oral ruling of the trial court, granting Respondent's motion to suppress, was transcribed and is reprinted at App. 19.

The June 27, 1996, order of the trial court, suppressing statements of Respondent and all subsequently obtained evidence, is reprinted at App. 22.

The July 2, 1996, supplemental findings of the trial court are reprinted at App. 31.

The September 10, 1997, order of the Texas Court of Criminal Appeals, granting the State's Petition for Discretionary Review, is not reported and is reprinted at App. 33.

The November 25, 1998, opinion of the Texas Court of Criminal Appeals, dismissing the Petition for Discretionary Review as being improvidently granted, is reported at *State v. Consaul*, 982 S.W.2d 899 (Tex. Cr. App. 1998). The opinion is reprinted at App. 34.

The March 3, 1999, order of the Court of Appeals, Eighth District of Texas, granting the State's Motion to Stay Mandate, is not reported and is reprinted at App. 51.

The February 3, 1999, order of the Texas Court of Criminal Appeals, denying the State's Motion for Rehearing, is not yet reported and is reprinted at App. 52.

JURISDICTION OF THIS COURT

This petition for writ of certiorari seeks review of the April 10, 1997, decision of the Court of Appeals, Eighth District of Texas. On April 10, 1997, the Court of Appeals, Eighth District of Texas issued its opinion. On April 29, 1997, Petitioner moved for an extension of time to file its Petition for Discretionary Review. On May 2, 1997, the Texas Court of Criminal Appeals extended Petitioner's time to file the Petition for Discretionary Review until June 16, 1997. On June 16, 1997, Petitioner filed its Petition for Discretionary Review in the Texas Court of Criminal Appeals. On September 10, 1997, the Texas Court of Criminal Appeals granted Petitioner's Petition for Discretionary Review.

On October 9, 1997, Petitioner moved for an extension of time to file its brief in the Texas Court of Criminal Appeals. On October 14, 1997, Petitioner's Motion for Extension of time to file the State's Brief was granted until October 24, 1997. On October 24, 1997, Petitioner

filed its Brief on Petition for Discretionary Review in the Texas Court of Criminal Appeals. The Texas Court of Criminal Appeals heard oral arguments on the cause on February 4, 1998. On November 25, 1998, the Texas Court of Criminal Appeals dismissed as improvidently granted Petitioner's Petition for Discretionary Review.

On December 15, 1998, the Texas Court of Criminal Appeals granted Petitioner's motion to extend time for filing its Motion for Rehearing untii January 8, 1999. Petitioner filed its Motion for Rehearing on January 8, 1999, which was denied by the Texas Court of Criminal Appeals on February 3, 1999. Petitioner filed its motion to stay mandate on February 12, 1999, which was granted by the Court of Appeals, Eighth District of Texas, on March 3, 1999. Jurisdiction of this Court to review the decision of that court is invoked under 28 U.S.C.A. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article 38.22 of the Texas Code of Criminal Procedure states, in pertinent part:

Sec. 2. No written statement made by an accused as a result of custodial interrogation is admissible as evidence against him in any criminal proceeding unless it is shown on the face of the statement that:

> (a) the accused, prior to making the statement, either received from a magistrate the warning provided in Article 15.17 of this code or received from the person to whom the statement is made a warning that:
>
> > (1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
> >
> > (2) any statement he makes may be used as evidence against him in court;
> >
> > (3) he has the right to have a lawyer present to advise him prior to and during any questioning;
> >
> > (4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and
> >
> > (5) he has the right to terminate the interview at any time; and
>
> (b) the accused, prior to and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights set out in the warning prescribed by Subsection (a) of this section.

TEXAS CODE CRIM. PROC. ANN. art. 38.22 (Vernon 1979).

STATEMENT OF THE CASE

The Evidence

Sunday, January 21, 1996

On Sunday evening, January 21, 1996, officers were dispatched to room 25 at the Horizon Lodge in Horizon City, Texas, in response to a reported kidnapping. At the scene, the officers met with Respondent, Heidi Schramm Consaul, who informed the officers that her eighteen-month-old child was missing. Respondent provided a brief statement and photographs of the child to broadcast.

Respondent signed a prosecution statement acknowledging her desire to file criminal charges against the individual responsible for her child's disappearance. Respondent mentioned the child's father as a possible suspect for the kidnapping. She also informed the officers that she had seen a car parked next to hers with its dome light on and an unknown male walking towards her apartment. No other leads were provided.

Although Respondent reported that the child had been kidnapped, the officers feared that the child may have wandered off and were concerned about the cold temperatures. A search of the area surrounding the lodge, nearby golf course, and park was initiated. The search for the missing child continued through the evening of the 21st.

Monday, January 22, 1996

The following morning, Respondent and her sister, Christina Hartford, came to the Horizon Police Department, where they were able to "get on the camera" and tape an interview for local television media distribution asking for assistance in locating the child. Sheriff's deputies contacted local search and rescue teams and gathered all other deputies that could be spared to assist in the search. Search dogs were used to track the scent of the child, and a helicopter was used to do an aerial search. One pool of water at a nearby golf course was dragged with no success.

That afternoon, Respondent was asked if she would come down to the Sheriff's Office so that she could talk to the detectives in a quiet environment, away from the searchers and media. Respondent responded that her vehicle was not running properly and that she did not have enough gas to make it into town. Deputy James Reuter offered to transport Respondent to the Sheriff's office, and Respondent accepted the ride.

Deputy Reuter picked Respondent up at her home to transport her to the Sheriff's office. He was not in uniform. Respondent was never handcuffed and she rode in the front passenger seat of the vehicle. During the drive, Deputy Reuter and Respondent discussed Berlin, Germany where Respondent previously resided.

Daniel Diaz and Onesimo Esparza, detectives with the El Paso County Sheriff's Department, assisted Deputy Reuter with the interview of Respondent. The detectives provided Respondent with the *Miranda* warnings which Respondent waived in writing. The interview lasted a

little over two hours at which time the officers terminated the interview in response to Respondent's request for counsel. Nevertheless, immediately following her request for counsel, Respondent demanded of the officers that they find her child. It is undisputed that following the interview, Deputy Reuter transported Respondent back to her home.

That evening, pictures of the child were again broadcast on the news. Respondent again pleaded on the news for help in finding her missing child. The search effort for the missing child continued until after dark.

Tuesday, January 23, 1996

At approximately 10:30 a.m., a Bloodhound Team from a neighboring county in New Mexico, offered their services to assist in the search for the child. Officers spoke to Respondent – at her home – to ask for her consent to go into the apartment so that the bloodhounds could pick up the scent of the child. Respondent agreed and signed the consent.

On that morning, the FBI was dispatched to the scene of the child's disappearance to initiate an interstate kidnapping case. While the FBI was on the scene, Respondent arrived with her sister. Agents spoke with Respondent to gather information necessary to launch the interstate kidnapping investigation.

The agents asked Respondent if she would take a polygraph examination explaining that it was standard procedure in a kidnapping investigation to eliminate the

parents as suspects. Respondent agreed to take a polygraph examination on the following day, stating that she "had nothing to hide" and that "she would be glad to take the polygraph." Because of Respondent's transportation difficulties, Deputy Reuter offered to have an officer transport Respondent to the place of the examination. Respondent accepted the offer.

Wednesday, January 24, 1996

On Wednesday morning, Detective Cook of the El Paso Sheriff's Department transported Respondent to the Sheriff's office. Reuter walked Respondent across the street to the FBI office but did not remain with Respondent during the polygraph examination. Detective Cook came and went during the interview, waiting for Respondent to finish the polygraph examination so that he could take her home.

At approximately 2:00 p.m., Detectives Diaz and Esparza went to the FBI office and were informed that Respondent failed the polygraph examination. Detectives Diaz and Esparza said "hello" to Respondent, who was standing close to Deputy Reuter in the hallway. Respondent responded, saying, "I can't believe the machine is saying that I'm lying." Esparza asked Respondent, "Do you want to talk about it?" to which Respondent responded, "Yes." While speaking with the officers, Respondent stated that she had dumped the child's body in the desert after waking up from a nap and finding that the child had suffocated on a plastic bag.

Respondent led the officers to the child's body. While returning to the Sheriff's Office, the officers bought

Respondent dinner and gave her a break for about an hour. After the break, Respondent gave a written statement. After Respondent gave her statement, the officers admitted Respondent to Thomason Hospital for a suicide watch.

Thursday, January 25, 1996

On Thursday, officers continued interviewing other individuals and attended the autopsy of the child. At approximately 9:00 p.m., the officers obtained a warrant for the arrest of Respondent.

Friday, January 26, 1996

On January 26, 1996, Respondent was released from Thomason Hospital. From the hospital, the detectives took Respondent back to the Sheriff's office for additional questioning. Following the final interview, Respondent was placed under arrest for capital murder.

Suppression Hearing

On June 14, 1996, Respondent filed a motion to suppress all of her oral and written statements. During the State's presentation regarding the admissibility of the Monday, January 22nd interview, the trial court announced a fifteen minute recess for the stated purpose of giving the court reporter a break. After the break, the trial judge entered the courtroom, announced that he had made his decision, and handed both parties eight, typewritten pages of findings of fact and conclusions of law granting Respondent's motion to suppress the Monday,

January 22nd interview and all later statements and evidence derived therefrom. Although the State objected to the fact that the trial court ruled before the State had even presented its case, the trial court responded that as a result of its seventeenth finding of fact, which stated the finding that, "it doesn't really matter what evidence you put on at this time." *See* App. 21.

Petitioner filed its notice of appeal on July 2, 1996. Petitioner emphasized Respondent's return home after her request for an attorney as evidence that Respondent was not in custody, or, if she was, that her request was vitiated by the fact that she was returned home where she continued to ask for law enforcement help in finding her child.

On April 10, 1997, the Court of Appeals, Eighth District of Texas, in a published opinion authored by Chief Justice Barajas, affirmed the order of the trial court granting Respondent's motion to suppress evidence. App. 1. The Court of Appeals agreed with the trial court that although Respondent was not initially in custody when she accompanied the officers to the station, she, at some undetermined point during the interview, became subject to custodial restraint prior to the time she invoked her right to counsel. App. 13. The Court of Appeals also agreed with the trial court that following her invocation of right to counsel, the officers were the ones who initiated contact with Respondent. App. 16.

The Court of Appeals determined that the trial court did not abuse its discretion in finding that Respondent was in custody because the facts that the trial court relied in reaching its conclusion were supported by the record.

App. 13. The Court of Appeals, however, did not address un-controverted facts that the State argued were relevant, determinative, and contrary to the trial court's finding on the ultimate issue of custody. Most importantly, neither the trial court nor the Court of Appeals addressed the State's argument that Respondent was not in custody when she requested an attorney since she was free to, and did in fact, terminate the interview and go home.

Relying on *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the Court of Appeals also held that once a suspect invokes her Fifth Amendment right to counsel, she cannot be further interrogated by law enforcement officers until counsel has been provided or the suspect initiates further communication with the police. App. 16. The Court of Appeals determined that there was at least some support in the record for the trial court's finding that Respondent did not re-initiate contact with the officers, based on the testimony of one officer who stated that respondent did not initiate contact with him. App. 16. However, the Court of Appeals did not consider, or even discuss, the fact that after Respondent had invoked her right to counsel, she continually reiterated her demand to law enforcement officers that they find her missing child. Furthermore, the Court of Appeals did not address the fact that once Respondent was returned home, she immediately and publically continued her ruse of claiming that her child had been kidnapped.

REASONS FOR GRANTING THE WRIT

1. In a published opinion, the Court of Appeals, Eighth District of Texas held that an individual who terminates an interview and goes home is nonetheless in custody. This ruling is in direct conflict with this Court's holding in *Stansbury v. California*, 511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994) and should be reviewed by this Court.

2. In a published opinion, the Court of Appeals, Eighth District of Texas ruled that break in or release from custody does not terminate the right to counsel under *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). This decision is in conflict with the language of this Court in *McNeil v. Wisconson*, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991), and the decisions of other federal[1] and state[2] courts.

---

[1] *See United States v. Skinner*, 667 F.2d 1306 (9th Cir. 1982); *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987); *McSpadden v. Garraghty*, 820 F.2d 654 (4th Cir. 1987); *Dunkins v. Thigpen*, 854 F.2d 394 (11th Cir. 1988); *United States v. Hines*, 963 F.2d 255 (9th Cir. 1992); *United States v. Barlow*, 41 F.3d 935 (5th Cir. 1994); *see also United States v. Garey*, 813 F. Supp. 1069 (D. Vt. 1993); *United States v. Drake*, 934 F. Supp. 953 (N.D. Ill. 1996).

[2] *See People v. Scaffidi*, 15 Cal. Rptr. 2d 167 (Cal. App. 4 Dist. 1992); *People v. Trujillo*, 773 P.2d 1086 (Colo. 1989); *Gonzalez v. State*, 449 So.2d 882 (Fla. App. 3 Dist. 1984); *Keys v. State*, 606 So.2d 669 (Fla. App. 1 Dist. 1992); *State v. Bymes*, 375 S.E.2d 41 (Ga. 1989); *Wilson v. State*, 444 S.E.2d 306 (Ga. 1994); *State v. Norris*, 768 P.2d 296 (Kan. 1989); *State in Interest of Wells*, 532 So.2d 191 (La. App. 3 Cir. 1988); *Commonwealth v. Galford*, 597 N.E.2d 410 (Mass. 1992); *Willie v. State*, 585 S.E.2d 660 (Miss. 1991); *State v. Kyger*, 787 S.W.2d 13 (Tenn. Cr. App. 1989); *State v. Furlough*, 797 S.W.2d 631 (Tenn. Cr. App. 1990); *Tipton v. Commonwealth*, 447 S.E.2d 539 (Va. App. 1994); *State v. Mckenzie*,

3. In a published opinion, the Court of Appeals, Eighth District of Texas ruled that reiteration of a plea for help in solving the crime ultimately charged does not constitute an initiation of contact under *Edwards*. This decision is in direct conflict with this Court's ruling in *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983).

ARGUMENT AND AUTHORITIES

1. Whether an individual who terminates an interview and is returned home is nonetheless in custody pursuant to *Stansbury v. California*, 511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994)?

This Court has ruled that a person is considered in "custody" only if a reasonable person would believe that his or her freedom of movement was restrained to the degree associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318; 114 S. Ct. 1526, 1529, 128 L. Ed. 2d 293, 298-299 (1994); *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714 (1977). Nonetheless, even though the Court of Appeals acknowledged in its general recitation of the facts that Respondent terminated the interview and went home, the Court did not even mention this fact in reviewing the trial court's determination of whether Respondent was in custody and in fact agreed with the trial court that custody was established despite the

---

475 S.E.2d 521 (W. Va. 1996); *Brown v. State*, 661 P.2d 1024 (Wyo. 1983); *see also, People v. Davis*, 554 N.Y.S.2d 460 (Ct. App. 1990).

uncontradicted fact that Respondent went home after the interview that the trial court and Court of Appeals deemed to be custodial.

A reasonable person would not believe that she was in custody or restrained to the degree associated with a formal arrest if she felt at liberty to terminate an interview and did, in fact, go home. Nor would a person restrained to the degree associated with a formal arrest be permitted to terminate an interview and go home. The ruling of the Court of Appeals thus disregards the uncontroverted fact that Respondent terminated the interview and went home and the established precedent of this Court.

2. Whether an undisputed break in custody is a relevant factor in determining whether or not an *Edwards* violation has occurred?

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), this Court established certain procedural safeguards for perceived compulsion inherent in custodial interrogation. In order to achieve maximum security of the privilege against self incrimination, this Court held that unless other fully effective means are devised to inform accused persons of their right of silence, and to assure a continuous opportunity to exercise it prior to any questioning, the person must be warned that: (1) he has a right to remain silent; (2) that any statement he does make may be used as evidence against him; and (3) that he has a right to the presence of an attorney, either retained or appointed.

Thus, the right to an attorney mandated by this Court in *Miranda*, is not a requirement intended to activate the Sixth Amendment right to counsel. Instead, it is simply a procedural safeguard to insure maximum compliance with the right against self-incrimination by law enforcement agents during custodial interrogation, the environment in which the interrogation is viewed as being inherently coercive.

Then, in *Edwards*, this Court further refined the boundaries of restraint on police interrogation. There, this Court held that even though an accused may have been advised of his *Miranda* rights, when he invokes his right to have counsel present during custodial interrogation, a valid waiver of that right cannot thereafter be established by showing only that he responded to further police-initiated custodial interrogation. In other words, before an accused may be subjected to further questioning after having invoked his right to counsel, he must be the one to initiate further discussions with the police.

Thus, it is readily apparent that the Fifth Amendment right to counsel serves no constitutional purpose except as a prophylactic safeguard to offset the coercive pressures that would otherwise inhibit an accused from the ability to fully exercise his privilege against compelled self-incrimination. And because the psychological environment indigenous to custodial interrogation is one that will often overcome an accused's will to exercise such privilege, this Court believed it necessary that an accused be advised of his rights and that once he has exercised his right to counsel in that setting that request must be scrupulously observed unless the accused himself chooses to forfeit that right.

On the other hand, it should be equally apparent that the need for any measures believed necessary to compensate for such an inherently coercive environment dissipates once such environment no longer exists, in that the only coerciveness that the Fifth Amendment right to counsel was believed necessary to offset was that of psychological intimidation inherent in custodial interrogation. Therefore, it should follow that if an accused is no longer subject to custodial interrogation, those prophylactic safeguards are likewise no longer necessary to "even the playing field."

Because of this prophylactic purpose served by the Fifth Amendment right to counsel, several federal circuit courts have held that a break in custody ends the need for the *Edwards* rule. That is, even if an accused has invoked his right to counsel during custodial interrogation, once that period of custody terminates, so terminates the right to counsel.[3] Several states have reached the same conclusion.[4]

---

[3] *See United States v. Skinner*, 667 F.2d 1306 (9th Cir. 1982); *United States. ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987); *McSpadden v. Garraghty*, 820 F.2d 654 (4th Cir. 1987); *Dunkins v. Thigpen*, 854 F.2d 394 (11th Cir. 1988); *United States v. Hines*, 963 F.2d 255 (9th Cir. 1992); *United States v. Barlow*, 41 F.3d 935 (5th Cir. 1994). *See also, United States v. Garey*, 813 F. Supp. 1069 (D. Vt. 1993); *United States v. Drake*, 934 F. Supp. 953 (N.D. Ill. 1996).

[4] *See People v. Scaffidi*, 15 Cal. Rptr. 2d 167 (Cal. App. 4 Dist. 1992); *People v. Trujillo*, 773 P.2d 1086 (Colo. 1989); *Gonzalez v. State*, 449 So.2d 882 (Fla. App. 3 Dist. 1984); *Keys v. State*, 606 So.2d 669 (Fla. App. 1 Dist. 1992); *State v. Bymes*, 375 S.E.2d 41 (Ga. 1989); *Wilson v. State*, 444 S.E.2d 306 (Ga. 1994); *State v. Norris*, 768 P.2d 296 (Kan. 1989); *State in Interest of Wells*, 532

Although this Court has not decided this issue directly, in *McNeil v. Wisconson*, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991), such a rule was implicitly approved. When discussing the rationale of *Edwards v. Arizona, supra*, and *Minnick v. Mississippi*, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), this Court wrote:

> In *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), we established a second layer of prophylaxis for the *Miranda* right to counsel: Once a suspect asserts the right, not only must the current interrogation cease, but he may not be approached for further interrogation "until counsel has been made available to him," 451 U.S., at 484-485, 101 S. Ct., at 1884-1885, which means, we have most recently held, that counsel must be present, *Minnick v. Mississippi*, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990). If the police do subsequently initiate an encounter in the absence of counsel **(assuming there has been no break in custody)**, the suspect's statements are presumed involuntary and therefore admissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.

So.2d 191 (La. App. 3 Cir. 1988); *Commonwealth v. Galford*, 597 N.E.2d 410 (Mass. 1992); *Willie v. State*, 585 S.E.2d 660 (Miss. 1991); *State v. Kyger*, 787 S.W.2d 13 (Tenn. Cr. App. 1989); *State v. Furlough*, 797 S.W.2d 631 (Tenn. Cr. App. 1990); *Tipton v. Commonwealth*, 447 S.E.2d 539 (Va. App. 1994); *State v. Mckenzie*, 475 S.E.2d 521 (W. Va. 1996); *Brown v. State*, 66 1 P.2d 1024 (Wyo. 1983). *See, also, People v. Davis*, 554 N.Y.S.2d 460 (Ct. App. 1990).

McNeil v. Wisconsin, 501 U.S. at 176-77, 111 S. Ct. at 2208, 115 L. Ed. 2d at 167-68. (Emphasis added). Thus, it appears that this Court has indicated, at least implicitly, that the *Edwards* rule will not apply if there has been a break in custody.

Using this construct, even if the January 22nd interview was custodial, it is undisputed that any such period of custody terminated when Respondent terminated the interview and returned home. At that point, Respondent's right to counsel that she had previously invoked ceased because the coercive environment also ceased, and the *Edwards* prohibition on police questioning also ceased.

3. Whether reiteration of a plea for help in solving the crime ultimately charged constitutes an initiation of contact under *Edwards*?

This Court has clearly established that an effective waiver of the right to counsel may take place if the accused initiates further communication, exchanges, or conversations with the police or law enforcement officials. *Edwards v. Arizona, supra*. Here, immediately following Respondent's invocation of counsel, Respondent reiterated to the officers that they had to find her child. This statement was an exchange or communication regarding the investigation surrounding the disappearance of her child and amounted to an immediate reinitiation of contact following the invocation of her right to counsel. In addition to Respondent's immediate request for assistance, Respondent went home and continued to report to anyone who would listen to her that

her child had been kidnapped. Respondent again appeared on the evening news begging for the return of her child. The following day, Respondent returned to the scene of the search with her sister and reported to the FBI that her child had been kidnapped, thereby launching an interstate kidnapping investigation. These actions – asking for help finding her missing child, asserting that her child had been kidnapped and going to the scene of the search to provide information regarding the alleged "kidnapping" to the FBI – represented a desire of Respondent to open up a more generalized discussion with law enforcement personnel relating directly or indirectly to the investigation of her missing child, and constituted a re-initiation of contact and waiver of her previous invocation of her right to counsel.

The ruling by the Court of Appeals that these actions did not constitute initiation of contact is in direct conflict with the previous decisions of this Court. *See Wyrick v. Fields*, 459 U.S. 42, 103 S. Ct. 394, 74 L. Ed. 2d 214 (1982); *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983). In addition, the Court of Appeals' published prohibition against any law enforcement contact in an emergency situation following a request for counsel has serious and dangerous implications for public safety.[5] The liability that law enforcement agencies

---

[5] At least one court has recognized that the right to life is more important than the right against incrimination. In *People v. Modesto*, 62 Cal.2d 436, 42 Cal. Rptr. 417, 398 P.2d 753 (1965), the California Supreme Court held that, in cases involving kidnapping, the concern of law enforcement agents in finding a kidnapping victim outweighs the Fifth Amendment rights of the kidnapper. *See People v. Riddle*, 83 Cal. App. 3d 563, 148 Cal.

could incur for ignoring a mother's pleas for help in finding her child if the child had been kidnapped or wandered off in the middle of winter, cannot be overlooked. Finally, and perhaps more importantly, the life of a missing child must also be weighed and held superior to overprotective prophylactic precautions established by the Court of Appeals.

Rptr. 170, 176-78 (Ct. App. 1978), *cert. denied*, 440 U.S. 937, 99 S. Ct. 1283, 59 L. Ed. 2d 496 (1979); *People v. Dean*, 39 Cal. App. 3d 875, 114 Cal. Rptr. 555, 559-60 (Ct. App. 1974). The California Court of Appeals eloquently explained the balance in *Dean* when it wrote:

> (E)ven more basic than the right of a citizen not to be compelled to incriminate himself is the right of a citizen to his Life. . . .
>
> . . . While life hangs in the balance, there is no room to require admonitions concerning the right to counsel and to remain silent. . . . While we do not countenance the rubber hose to obtain the answers, we see no wrong in asking the type of questions found herein. The easy answer is to decide that the police are under a duty to ask questions concerning the location of the victim but that none of the defendant's answers may be used against him in a court of law. This would seem to protect both the victim and the accused. What about the "fruit of the poisonous tree" doctrine? Its application could well free the accused and basic justice would be wanting. While a premium must be placed on rescue of the victim, this must not occur in a setting that will merely turn the criminal loose again to work his evil upon others. The kidnapper must be stopped and the victim saved.

People v. Dean, 114 Cal. Rptr. at 559-60.

CONCLUSION

The published decision of the Court of Appeals not only contradicts the established precedent of this Court and various state and federal courts, but it establishes unconscionable guidelines under which law enforcement officials must operate. For all reasons stated, the Petitioner respectfully requests that the judgment of the Court of Appeals, Eighth District of Texas be reversed.

Respectfully submitted,

KAREN L. LANDINGER
Asst. Dist. Attorney
34th Judicial District
201 El Paso County Courthouse
500 E. San Antonio
El Paso, Texas 79901
Telephone: (915) 546-2059 X3212
Fax: (915) 533-5520

APPENDIX

[SEAL]

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS,	§	No. 08-96-00343-CR
Appellant,	§	Appeal from the
v.	§	171st District Court of
HEIDI SCHRAMM CONSAUL,	§	El Paso County, Texas
Appellee.	§	(TC# 960D03837)

OPINION

This is a State's appeal from an order of the trial court granting Appellee's motion to suppress her oral and written statements. We affirm.

I. SUMMARY OF THE EVIDENCE

The record in the instant case establishes that on Sunday, January 21, 1996, law enforcement officers were dispatched to the Horizon Lodge in Horizon City, Texas, in response to a reported kidnapping. Appellee, then residing, at the Horizon Lodge, related to the responding officers that her eighteen-month-old child was missing. She stated that she left her apartment to make a telephone call and discovered the child missing upon her return. Appellee signed a prosecution statement and law enforcement officials started a search for the missing child.

Detective James Reuter of the El Paso County Sheriff's Department testified that he responded to the initial

call and obtained information from Appellee regarding possible suspects in the purported kidnapping. The following day, January 22, 1996, Reuter asked Appellee if she would go to the County Sheriff's Office in order to discuss the matter away from the crowds and media. He testified that she agreed to go there, but further noted that she had a transportation problem in that her car was not in good running condition. She agreed to accompany Reuter. Detective Reuter stated, in transporting Appellee to the sheriffs office, she was not handcuffed and she rode in the front passenger seat. Appellee did not raise the issue of contacting an attorney.

Upon arrival at the sheriff's office, Detective Reuter met with Detectives Daniel Diaz and Onesimo Esparza. Together they conducted an interview with Appellee. Detectives Diaz and Esparza testified that throughout the interview, Appellee was never handcuffed and was otherwise free to leave, if she so desired. Appellee was purportedly being interviewed as a witness to the kidnapping. Detective Diaz stated that at the outset of the interview, Appellee was read her *Miranda* warnings. The detectives stated that Appellee was not under the influence of alcohol or drugs, was not promised anything or coerced with regard to the interview, and was never denied access to beverages, the bathroom, or cigarettes. Diaz testified that every the Appellee went to the bathroom, someone waited for her in the hall in order to monitor where she was in order to make sure she did not leave.

Detective Diaz further stated that the Appellee's interview was videotaped. This videotape was made part of the record at the hearing on Appellee's motion to

suppress and is properly before this Court. This videotape does indeed establish that Appellee was read her *Miranda* warnings and she signed a card waiving those rights. The course of the interview initially involved the existence of various suspects and the circumstances under which Appellee's daughter disappeared. Appellee was asked if she would take a lie detector test. Appellee was then asked if she had harmed the child and the interview immediately became accusatory concerning the disappearance of her child. The detectives accused Appellee of lying about the circumstances of her daughter's disappearance. Nonetheless, Appellee continued to deny any knowledge of the whereabouts of her child. The videotape shows Sheriff's Detective Captain Gary Gabbert enter the interview room, question Appellee about various aspects of the case and likewise state that he did not believe Appellee's "story." Captain Gabbert then left the interview room. The interview continued at an increased pace, with the questions going back and forth between aspects of Appellee's story and accusations that she was lying. Appellee continually denied involvement in the disappearance. The following exchange then occurred:

DIAZ: You wish you could tell us.

APPELLEE: I wish I knew.

DIAZ: A lot of –

APPELLEE: I told you everything I know, everything.

DIAZ: No.

ESPARZA: Do you have a –

DIAZ: Do you want to go home?

APPELLEE: Yes, I want to go home.

DIAZ: Well, tell us so we can take you home. Just tell us where she's at.

APPELLEE: I told you everything.

DIAZ: Let's go pick her up. Let's go.

APPELLEE: I don't know where she is.

After further questioning, Esparza pushed the table back and both Esparza and Diaz got in close proximity to Appellee and appeared to touch and stroke her from time to time. Throughout the interview, Appellee was seated in the corner of the interview room. The following, exchange occurred:

DIAZ: Don't hold it in.

APPELLEE: Am I allowed a lawyer still?

DIAZ: You need a preacher.

ESPARZA: That's what you need.

APPELLEE: This is ridiculous.

DIAZ: You need a preacher. She needs a preacher. She needs a preacher.

APPELLEE: I don't believe she's dead. I don't.

DIAZ: Why? Oh, things are getting to you now, huh? If you would have thought in the long run. 'Oh my God, things are going to happen,' you would have been more prepared, huh? But you weren't prepared for this type of interview, huh? You thought we were just

going to – just skim it and go on your merry way and not even have a chance or an opportunity to look for Carina otherwise you would have been more prepared.

APPELLEE: I don't know where she is.

DIAZ: Just like in the movies. Why do You bring up movies all the time? You read papers. You read the real thing. You watch television. You know about that girl that was mentioned a little while ago, you know.

APPELLEE: I don't know where she is.

ESPARZA: You knew about it.

. . .

APPELLEE: Am I still allowed a lawyer?

DIAZ: You want a lawyer?

APPELLEE: Yes.

DIAZ: For what?

APPELLEE: Because it sure sounds like you guys are trying to imply me on this.

DIAZ: Well say if you want a lawyer. Don't ask us if you're entitled to a lawyer. You – you dreamt up this damn story. You tell us if you want a lawyer. I mean you're the one that's making this damn story up. For Christ's sake, you've been making the story up that you didn't kill your daughter; that somebody kidnaped her, some stranger –

APPELLEE: I didn't.

DIAZ: You tell us if you want a lawyer. I can't tell you. 'Hey, get a lawyer.' I can't tell you that.

APPELLEE: I just asked if I'm still allowed one.

DIAZ: What do you want? What do you want? You're intelligent. You came up with this classical theory and story that – you tell us. What do you want? What do you want? You want her to be found or not? What do you want?

APPELLEE: Yes, I want her to be found.

DIAZ: You want a lawyer? You tell us. You tell us.

APPELLEE: Yes, I want a lawyer.

DIAZ: Okay. Then we'll shut up. Huh? If you would have thought of this a long time ago, you would have buzzed, 'I want a lawyer', but we're never going to find her. You know that.

APPELLEE: We have to find her.

DIAZ: You live with that. You live with that. You live with that, girl. Here is your water if you need it.

ESPARZA: Why don't you go out and get yourself an attorney if that's what you want?

APPELLEE: I can't afford one. I need one –

DIAZ: No. You can find a way just like in the movies. And, in fact, we don't

> even want to talk to you no more. We'll be right back. We'll be right back. We'll be right back.

The record shows that after invoking her right to counsel, as shown above, the detectives terminated the interview. Appellee was left alone in the room for a period of approximately twenty minutes after which time she was returned home. Both detectives stated that Appellee was free to leave during the interview and she never became a suspect and the Appellee voluntarily rode home with Reuter.

The following, day, Detective Reuter contacted the FBI. As a result, the FBI began a kidnapping investigation. Ms. Cynthia Brawley, an FBI agent, stated that she interviewed Appellee but did not consider her as a suspect. She stated that a search was in progress for the missing child. Agent Brawley related that she was never informed that Appellee had previously invoked her right to counsel during the January 22 interview.

Detective Reuter testified that subsequent to the January 22 interview at which time she requested an attorney, he spoke with Appellee who agreed to take a polygraph test. Appellee stated that, "she had nothing to hide." Of greater significance to the ultimate outcome of the case before us is Detective Reuter's testimony regarding contacts between Appellee and law enforcement. Detective Reuter testified that Appellee did not initiate any contact with him. either on January 23 or 24. Moreover, Detective Reuter stated that he was not told anything concerning Appellee's prior request to see an attorney.

On January 24, Sheriff's Detective Timothy Cook transported Appellee to the sheriff's office. Appellee related to him that a relative had advised her to obtain an attorney. Detective Cook testified that he told her that she should do so if she felt it necessary. On that same day, Special Agent H. L. Byford of the FBI administered Appellee's polygraph examination. Detective Esparza testified that after Appellee took the polygraph test at the FBI office, Detective Reuter told both him and Detective Diaz that Appellee had demonstrated deception during the polygraph examination. Detective Esparza testified that immediately after the polygraph, both he and Detective Diaz came up to Appellee and greeted her. Appellee indicated to Detective Diaz that she did not know why the machine stated that she was lying. At that time, Appellee was asked if she wanted to talk about it, to which Appellee stated "yes." Appellee accompanied the detectives back to the sheriff's office.

The record shows that Detective Diaz testified that after Appellee made the statement pertaining to the polygraph "lying," he responded by telling Appellee that, "we will just go over to the office and we will talk there." He noted that in response to the question of why he Could question Appellee again, Detective Diaz responded, "I took it upon myself." Once again, of greater significance to the ultimate outcome of the instant case is Detective Diaz's testimony that he initiated the contact with Appellee at the FBI office.

Detective Esparza testified that while at the sheriff's office, Appellee was once again advised of her *Miranda* rights, although there was no videotape made of the initial part of this second interview. During the course of

this second interview, Appellee stated that she discovered that her child had fallen out of her crib and suffocated on a plastic bag. No signs of life were detected and she took the child out in the desert and left her there. The body of her eighteen-month-old child was subsequently found. Upon discovering the child's body, Appellee returned to the sheriff's office and gave a written statement.

The trial court found, among other matters, that the interview on January 22, 1996, was a custodial interrogation and Appellee had invoked her fifth amendment right to an attorney.

II. DISCUSSION

In Points of Error Nos. One and Two, the State asserts that the trial court erred in suppressing Appellee's statements because there was no fifth amendment violation and there was no violation of Article 38.22 of the Code of Criminal Procedure. We disagree.

A trial court has broad discretion in determining the admissibility of evidence, and we will not reverse absent a clear abuse of discretion. *Allridge v. State*, 850 S.W.2d 471, 472 (Tex.Crim.App. 1991), *cert. denied*, ___ U.S. ___, 114 S.Ct. 101 (1993). On a motion to suppress evidence, the trial judge is the sole and exclusive trier of fact and judge of the credibility of witnesses, including the weight to be given their testimony. *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App. 1990); *Cannon v. State*, 691 S.W.2d 664 (Tex.Crim.App. 1985), *cert. denied*, 474 U.S. 1110 (1986); *Laca v. State*, 893 S.W.2d 171, 177 (Tex.App. – El Paso 1995, pet. refd); *Lee v. State*, 893 S.W.2d 80, 84 (Tex.App. – El Paso 1994, no pet.); *Chavarria v. State*, 876

S.W.2d 388, 391 (Tex.App. – El Paso 1994, no pet.). In that regard, the trial court is free to believe or disbelieve the testimony of each of the State's witnesses as well as the evidence of the accused, if any. This appellate court must view the record evidence and all reasonable inferences therefrom in the light most favorable to the trial court's ruling. *Romero,* 800 S.W.2d at 543. We dare not engage in our own factual review but merely decide whether or not the trial judge's findings of fact are supported by the record. If the findings are supported by the record, we are not at liberty to disturb them. Thus, on review, we only address the question of whether the trial court improperly applied established law to the facts. *Romero,* 800 S.W.2d at 543; *Laca,* 893 S.W.2d at 177; *Lee,* 893 S.W.2d at 84. Should the trial judge's determination be correct on any theory of law applicable to the case, it will be sustained. *Romero,* 800 S.W.2d at 543; *Laca,* 893 S.W.2d at 177; *Lee,* 893 S.W.2d at 84. This principle holds true even if the trial court should give the wrong reason for its decision, especially when that decision concerns the admission of evidence. *Romero,* 800 S.W.2d at 543; *Dugard v. State,* 688 S.W.2d 524 (Tex.Crim.App. 1985).

At the outset, the State asserts that the Appellee was not in custody during the interview of January 22, 1997. A person is considered in "custody" only if a reasonable person would believe that his or her freedom of movement was restrained to the degree associated with a formal arrest. *Stansbury v. California,* 511 U.S. 318, 114 S.Ct. 1526, 1528-1530, 128 L.Ed.2d 293, 298-99 (1994); *Dowthitt v. State,* 931 S.W.2d 244, 254 (Tex.Crim.App. 1996). The reasonable person standard presupposes an innocent person. *Id.* The subjective intent of law enforcement officials

to arrest is not relevant unless that intent is communicated or otherwise manifested to the suspect. *Stansbury*, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d at 300; *Dowthitt*, 931 S.W.2d at 254.

Formerly, the following four factors were utilized to determine custody:

(1) Probable cause to arrest;

(2) Subjective intent of the police;

(3) Focus of the investigation; and

(4) Subjective belief of the defendant.

Meek v. State, 790 S.W.2d 618, 621-22 (Tex.Crim.App. 1990). Under the *Stansbury* decision, factors two and four are irrelevant except to the extent that they are manifested in the words or actions of law enforcement officials. The determination of custody is based entirely upon objective circumstances. *Stansbury*, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d at 298; *Dowthitt*, 931 S.W.2d at 254. This determination is made on an *ad hoc* basis, after consideration of all the objective circumstances. *Id.*

When a person is transported to a police facility by the police in the course of an investigation, if the person was acting upon the invitation, request, or even the urging of the police and there were no threats, express or implied that he or she will be taken in a forcible manner and the accompaniment is voluntary and consensual, then the individual is not in custody. *Anderson v. State*, 932 S.W.2d 502, 505 (Tex.Crim.App. 1996); *Shiflet v. State*, 732 S.W.2d 622, 630 (Tex.Crim.App. 1985). Station house

questioning does not, by itself, constitute custody. *Dowthitt*, 931 S.W.2d at 255. However, the fact that an interrogation may **begin** as noncustodial does not prevent custody from arising later; the conduct of the police during the encounter may cause a consensual inquiry to escalate into custodial interrogation. *Id.*; *Ussery v. State*, 651 S.W.2d 767, 770 (Tex.Crim.App. 1983).

There are four general situations which may constitute custody:

(1) When the suspect is physically deprived of his or her freedom in any significant way;

(2) When a law enforcement official tells the suspect that he or she cannot leave;

(3) When law enforcement officials create a situation that would lead a reasonable person to believe there has been a significant restriction upon his or her freedom of movement; and

(4) When there is probable cause to arrest and law enforcement officers do not tell the suspect that he or she is free to leave.

Shiflet, 732 S.W.2d at 629. Regarding the first three situations above, the restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to mere investigative detention. *Dowthitt*, 931 S.W.2d at 255. Regarding the fourth and final situation, the officers' knowledge of probable cause must be manifested to the suspect. *Id.* This manifestation could occur if some information substantiating probable cause is related by the officers to the suspect or by the suspect to the officers. Further, as probable cause is a "factor" in other

cases, the fourth situation does not automatically establish custody. Custody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he or she is under restraint to the degree associated with an arrest. *Id.*

In the present case, we find that the trial court was warranted in finding that the interrogation of January 22 was custodial in nature. The actions of Detectives Diaz and Esparza of placing, themselves in extremely close physical proximity to Appellee, while Appellee is situated in a corner with no apparent avenue of egress, and touching, her and crowding her could very well be interpreted as conveying to her that her freedom was restricted. The trial court found as much, and we agree. The statement by Detective Diaz that Appellee could go home if she stated where the child was located is subject to the factual interpretation that Appellee was not otherwise free to leave the interview room until she changed her story. Once again, the trial court found as much, and we agree. There was testimony, albeit contradicted, that the officers took Appellee to the restroom and then waited for her until she came out in order to insure she did not leave. We find that the trial court very well could have determined that these factors were indicated to Appellee to the extent that would lead a reasonable person to believe there had been a significant restriction upon his or her freedom of movement to a degree associated with arrest. Given the above, we find that the trial Court did not err in finding that Appellee was in custody during the initial interview of January 22, 1996.

The State maintains that Appellee's invocation of counsel at that initial interview was equivocal. Specifically, the State maintains that Appellee was still asking for the assistance of the police in finding the child during her invocation of counsel, thus ameliorating the effect of the invocation of counsel. We disagree, given the following unequivocal statement:

DIAZ: You want a lawyer? You tell us. You tell us.

APPELLEE: Yes, I want a lawyer.

Once a suspect invokes her fifth amendment right to counsel, she cannot be further interrogated by law enforcement officers until counsel has been provided or the suspect initiates further communication with the police. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378 (1981); *Green v. State*, 934 S.W.2d 92, 97 (Tex.Crim.App. 1996). The mere mention of the word "attorney" or "lawyer," without more does not automatically invoke the right to counsel. *Etheridge v. State*, 903 S.W.2d 1, 18 (Tex.Crim.App. 1994). If a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer would have only understood that the suspect might be invoking the right to counsel, there is no requirement for the cessation of questioning. *Dinkins v. State*, 894 S.W.2d 330, 351 (Tex.Crim.App. 1995). The phrase, "Maybe I should talk to a lawyer" had been held to be too equivocal to constitute an invocation of the right to counsel. *Id.* at 352. However, the statement, "I think I want a lawyer" was held to be a clear and unequivocal assertion of right to counsel. *Id.* Viewing the evidence in the instant case, in a light most favorable to the trial court's ruling, we find

that the trial court was warranted in finding, that the invocation of right to counsel was unequivocal.

The State next contends that Appellee reinitiated contact with the law enforcement officers. An accused may effectively waive her right to assistance of counsel if she initiates contact with the police or law enforcement officials. *Baldree v. State*, 784 S.W.2d 676 (Tex.Crim.App. 1989). Although an accused may thereafter initiate further communication and waive the right to counsel previously invoked, a valid waiver of the right to counsel cannot be established by showing only that the accused responded to further police-initiated custodial interrogation. *Hicks v. State*, 860 S.W.2d 419, 429-30 (Tex.Crim.App. 1993). *Jones v. State*, 742 S.W.2d 398, 405-06 (Tex.Crim.App. 1987). The burden is clearly upon the State to affirmatively prove the accused initiated further contacts with agents of the State. *Wilkerson v. State*, 657 S.W.2d 784, 793 (Tex.Crim.App. 1983).

In the instant case, it is clear that Appellee invoked her right to consult with an attorney. The record is wholly silent as to whether that invocation was conveyed to the various law enforcement agencies working in conjunction to solve this "staged" kidnapping. What is apparent on the record is the fact that Appellee's invocation of her right to consult with an attorney was not communicated to the other law enforcement officials involved in the case. Knowledge of the invocation of any *Miranda* rights must be imputed to all representative of the State in order to preserve the efficacy of the suspect's rights. *Sterling v. State*, 8 S.W.2d 513 (Tex.Crim.App. 1990); *see Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986).

We have viewed the record evidence and all reasonable inferences therefrom in the light most favorable to the trial court's ruling. We find some evidence that law enforcement officers, not Appellee, reinitiated the contact to take the polygraph. Moreover, we find some evidence that law enforcement officers, not Appellee, reinitiated the contact by asking Appellee if she wanted to make a statement after knowing she had invoked her right to counsel. Given the above, we find that the State has failed to meet its burden in demonstrating that Appellee reinitiated contact. Points of Error Nos. One and Two and all their subparts are overruled in their entirety.

Having overruled Points of Error Nos. One and Two, we find it unnecessary to address Appellee's Cross-Points. We affirm the trial court's order that all statements made by Appellee, after invoking her right to counsel on January 22, 1996, be suppressed.[1]

---

[1] Appellee presents three cross-points. In Cross-Point No. Three, she challenges the jurisdiction of this Court to hear the appeal because the State's notice of appeal dates from the date of the order dated June 27, 1996. Appellee maintains that the notice of appeal should date from July 2, 1996 – the date of the supplemental order. That hearing was characterized as a bill of review. The findings adduced from that hearing are clearly supplemental to the date of the first order. Moreover, Appellee cites no authority in support of her proposition, nor does she provide cognizable argument beyond her conclusory assertion.

April 10, 1997

/s/ Richard Barajas
RICHARD BARAJAS,
Chief Justice

Before Panel No. 2
Barajas, C.J., McClure and Chew, JJ.

(Publish)

[SEAL]

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS,	§	No. 08-96-00343-CR
Appellant,	§	Appeal from the
v.	§	171st District Court of
HEIDI SCHRAMM CONSAUL,	§	El Paso County, Texas
Appellee.	§	(TC# 960D03837)
	§	

JUDGMENT

This cause came on to be heard on the record, and the same being considered, and it being the opinion of this Court that there was no error in the order, it is therefore ordered, adjudged and decreed that the order of the court below be affirmed, in accordance with the opinion of this Court, and that this decision be certified below for observance.

IT IS SO ORDERED THIS 10TH DAY OF APRIL, 1997.

/s/ Richard Barajas
RICHARD BARAJAS,
Chief Justice

Before Panel No. 2
Barajas, C.J., McClure and Chew, JJ.

June 27th, 1996 Order, Granting the Defendant's Motion to Suppress.

HEIDI SCHRAMM CONSAUL 960D03837
Statement of Facts
Volume II of IV (2 of 2)
pages 188 to 321

* * *

[p. 317] in jail on the 26th?

A. No.

Q. During the debriefing you referred to, was there anyone from the district attorney's office present at ten o'clock that morning on the 23rd?

A. The morning that we first found out? No, no, it was only myself and Agent Byford and Lieutenant Wilbur, I believe.

Q. And you have no personal knowledge or otherwise of anything about the system – the taping system that exists over there?

MR. GONZALEZ: Objection, asked and answered.

THE COURT: Sustained.

MR. GELO: I'll pass the witness.

MR. GONZALEZ: No further questions, Your Honor.

THE COURT: All right. We are going to take a break. The court reporter needs a break. We will take a break for fifteen minutes.

(A brief recess was taken.)

THE COURT: Before we go any further, the Court previously today has already gone ahead and found that the interrogation of January 22nd was a custodial interrogation, and that Article 38.22 applies. And the Court has already gone ahead and suppressed the video statement of that day. And because of the findings that [p. 318] the Court has made relevant to that particular proceeding, the Court feels that it is compelled to then go ahead and suppress everything that happened after that while the defendant was in custody. And I have allowed this hearing to go this afternoon because I was not sure exactly when the defendant came back in custody and was not sure about what exactly happened on January 23rd. Now that I have heard it, it's my opinion that the defendant was not in custody during the time that she was making this initial statement on January 23rd to this witness we have just talked about, and she did not go back in custody until she was picked up by sheriff's deputies on the morning of January 24th. And that is the Court's finding of fact No. 18, under it's finding that there were violations under Article 38.22. With that, then, the Court is just ready to go ahead and feels like it just has to rule. The Court is going to go ahead and rule at this time. And the orders of the Court are going to be as follows. It is ordered, adjudged, and decreed that all statements of the defendant made during the interrogation of January 22nd, 1996, and during all interrogations thereafter be and they are hereby suppressed. And it is ordered, adjudged, and decreed that all evidence obtained as a result of statements of the defendant after she invoked her right to counsel on January 22nd, 1996, be and is hereby suppressed. And I have got [p. 319]

written findings of fact and conclusions of law which I am filing with the clerk, and I have a copy for the State and the defendant. And that being the case, I think we are through here today. Court's in recess. Here's a copy to the State and here's a copy for the defendant. Court's in recess.

MR. LIZARRAGA: Your Honor, may I ask before we – while we are still on the record. We are in recess, but we are still on this hearing, or is this hearing over?

THE COURT: This hearing is over.

MR. LIZARRAGA: What – you have made – let me see, the Court has given us an order that we have not seen yet. It's 20 minutes until four on a hearing that we have continued. We have additional testimony to put on. And I think if the Court is saying that with the testimony that's already come in, you have made these findings –

THE COURT: Right.

MR. LIZARRAGA: – if we end up appealing this, we may want to continue putting on and –

THE COURT: You may do that. You may make a bill. What I'm saying is just by my finding of fact, I believe it is No. 17, in the second series of findings of fact, it doesn't really make any difference what evidence you put on at that point in time.

MR. LIZARRAGA: Okay.

* * *

IN THE DISTRICT COURT OF EL PASO COUNTY TEXAS
171ST JUDICIAL DISTRICT

THE STATE OF TEXAS

V. (Filed Jun 27, 1996)

HEIDI SCHRAMM CONSAUL

ORDER ON DEFENDANT'S MOTION TO SUPPRESS ORAL AND WRITTEN STATEMENTS OF ACCUSED AND EVIDENCE OBTAINED AS A RESULT THEREOF

On the 21st day of June, 1996, the above captioned matter came on for hearing before the Court pursuant to Article 38.22 Texas Code of Criminal Procedure, and the Court, after hearing the evidence at this hearing as well as reviewing the evidence offered at the hearing to reduce bond before the Jail Magistrate on February 8 & 9, 1996, viewing the video tapes and other exhibits, and having considered the argument of counsel, makes the following Findings of Fact, Conclusions of Law, and Orders thereon.

CHARACTER OF THE INTERROGATION OF JANUARY 22, 1996

FINDINGS OF FACT:

1. The investigation had focused on the accused. The Sheriff's Deputies repeatedly stated to the Defendant that they did not believe her and that she alone or acting in concert with another had to be responsible for the disappearance of the child.

2. The defendant was not free to leave. The arrangement of the interview room was changed during the

course of the interrogation until finally the Defendant was in a corner of a small room with walls to her left rear, rear, and right rear. A table was pushed directly in front of her and one sheriff's deputy was sitting directly to her left front while the other sat directly to her right front. There was no clear space around the Defendant. The walls, deputies and table were, if not touching her, no more than a few inches from her. The deputies repeatedly placed their hands on the Defendant. When the Defendant went to the rest room she was escorted by a deputy who stayed outside the rest room until she was finished and then escorted her back to the interview room. When the Defendant indicated she wanted to go home she was told she would have to change her story first. The interrogation did not terminate until after five attempts by the Defendant to invoke her right to counsel.

CONCLUSIONS OF LAW

1. The interrogation of January 22, 1996 was a custodial interrogation and subject to Art 38.22 TCCP.

2. The interrogation of January 22, 1996 was a custodial interrogation and the Defendant was entitled to her *Miranda* rights under the 5th amendment to the United States Constitution as applied to the states by the 14th Amendment thereto.

FAILURE TO COMPLY WITH ART. 38.22 TCCP ON JANUARY 22, 1996 AND ALL SUBSEQUENT INTERROGATIONS

FINDINGS OF FACT:

1. The warnings required by Art 38.22 sec. 2. (a) were not given. Initially, the Defendant was given warnings contained on a Sheriff's Department form 132-101. These warnings do not track those required by Art 38.22. The variations to the warnings are not harmless, they tend to lessen the impact of the legislative intent and ameliorate the intended effect of the required warnings. The required warnings are compared with the mutations below:

Sec. 2. (a)(1) You have the right to remain silent and not make any statement at all and that any statement you make may be used against you at your trial. VS. Sheriff's warning: You have the right to remain silent.

Sec. 2(a)(2) Any statement you make may be used against you in court VS. Sheriff's warning: If you give up your right to remain silent, anything you say can and will be used against you in a court of law.

Sec. 2(a)(3) You have the right to a lawyer present to advise you prior to and during all questioning. VS. Sheriff's warning: You have the right to speak with an attorney for advice before we ask you any questions and to have him with you during questioning.

Sec. 2(a)(4) If you are unable to employ a lawyer, you have the right to have a lawyer appointed to advise you prior to and during any questioning VS. Sheriff's warning: if you cannot afford an attorney, one will be appointed for you without charge before any questioning if you wish.

Sec. 2(a)(5) You have the right to terminate the interview at any time. VS. Sheriff's warning: If you decide to answer questions now without an attorney present, you will still have the right to stop answering questions at any time.

2. That the Sheriff's Department varied the warnings required by Sec. 38.22 with the intent to ameliorate the effect of the required warnings.

3. That the Defendant unequivocally invoked her right to an attorney.

4. That the Sheriff's Deputies did not comply with Defendant's request for an attorney.

5. That the Sheriff's Deputies did not respond to Defendant's request for an attorney appropriately, but rather argued with her, became belligerent, and stated they did not want to talk to her anymore. In response to Defendant's first attempt to invoke her right to counsel a deputy responded "what you need is a preacher".

6. That upon being told by the Defendant that she could not afford an attorney, the Sheriff's deputies responded, "get your own attorney just like in the movies".

7. That subsequent to the January 22 interrogation, but prior to the Interrogations of January 24, the Defendant's stepfather contacted the El Paso County Public Defenders Office to get legal assistance for the Defendant and was told she did not have a right to an attorney.

8. That no attorney was appointed to counsel with Defendant and Defendant was unable to consult with an attorney prior to or during any subsequent interrogation.

9. That during the interrogation on January 22, Defendant was told by Sheriff's Deputies that she would have to change her story before she could go home.

10. That the interrogation of January 22 was eventually stopped because the Defendant invoked her right to an attorney.

11. That the Sheriff's Deputies constantly lied to and deceived the Defendant in many ways.

12. That Deputy Diaz gave materially false testimony under oath before the Jail Magistrate during the hearing of February 8 & 9, 1996, when he testified the Defendant had never invoked her right to counsel.

13. That Deputy Diaz made a materially false statement of fact under oath in his affidavit to support the arrest warrant for the Defendant on charges of capital murder in that he Averred "Dr. Contin tentatively concluded that the infant child. . . . had died of a swollen brain as a result of contusions sustained to the head.", as the medical examiner has testified before the Jail Magistrate that he never said swelling of the brain was the cause of death, that he didn't think a blow to the head was the cause of death, and that his preliminary autopsy findings were consistent with accidental suffocation.

14. That the Court does not believe the Deputies testimony that there was no tape of the first interrogation on January 24, 1996.

15. That the operator of the video recording equipment was not competent. He testified the machine had a date time generator, but he didn't know how to use it. He

testified he thought he was recording the first interrogation on January 24, but that there was no tape in the machine. He testified the second interrogation of January 24th is on two tapes when it would easily fit one because he did not know the speed at which the machine operated.

16. It is not proven to the Court that the tapes have not been altered. State's exhibit 11 cuts off right in the middle of some action. The tape of the first interrogation of January 24 is not available. The second interrogation of January 24th is on two tapes even though it would easily fit on one. The recorder was equipped with a date time generator, but it was not used. Deputy Diaz did not include a portion of the original tape which included four of the Defendant's five attempts to invoke her right to counsel on the copy of the tape of the January 22 interrogation furnished to the Defendant's attorney.

17. That as a result of Findings of Fact #'s 1, 2, 4, 5, 6, 7, & 8 all further warnings to Defendant after January 22 were vitiated to the extent that Defendant could not have understood her rights or make an intelligent, or knowing, or voluntary waiver of them. For example: State's exhibit 11 is a long drawn-out 4 hour and 55 minute interrogation during which the Defendant continuously denies any culpable conduct in the death of her daughter while the Sheriff's Deputies constantly touch and stroke her. At one point, after she is totally strung out, and both deputies have their hands on her to force some action, she totally breaks down and says "I can't. . . . I can't . . . I can't. . . . It's too much", but the interrogation continued. Any woman who understood

that she had the right to simply say stop would have done so hours before.

18. That Defendant was in custody when she was picked up by a Sheriff's deputy on the morning of January 24, 1996 and remained in custody until her release on bond after indictment.

CONCLUSIONS OF LAW

1. The state failed to give the warnings required by Art. 38.22 TCCP before any of the statements and they are thus, inadmissible.

2. The Defendant did not and could not have made a knowing, or intelligent, or voluntary waiver of the rights set forth in Art. 38.22 TCCP before giving any of the statements and they are thus, inadmissible.

3. The video operator was not competent and the video statements SX-3, SX-8a, SX-8b, and SX-11 are thus, inadmissible.

4. It can not be said that the video statements SX-3, SX-8a, SX-8b, and SX-11 are accurate and have not been altered and they are thus, inadmissible.

5. The video tape of the first interrogation of January 24 has not been preserved and thus any evidence of statements made by the Defendant during the interrogation is, inadmissible.

6. The written statement SX-7 and the video statements SX-8a, SX-8b and SX-11 were taken after the Defendant invoked her right to counsel and before she had the

opportunity to meet with an attorney and are thus, inadmissible.

VIOLATIONS OF DEFENDANT'S RIGHTS UNDER THE 5TH AMENDMENT TO THE U.S. CONSTITUTION

FINDINGS OF FACT:

1. That the interrogation of January 22 was a custodial interrogation.

2. That the Defendant invoked her 5th amendment right to an attorney.

3. That the interrogation did not immediately stop after the invocation of right to counsel. Officers became belligerent with Defendant. Sheriff's Deputies initiated further contacts with defendant before she had the opportunity to confer with an attorney.

4. That the conduct of the officers during the interrogation of January 22 completely vitiated the effect of any future warnings that might have been given and thus made it impossible for the Defendant to make either a knowing, or intelligent, or voluntary waiver of her rights during subsequent interrogations.

CONCLUSIONS OF LAW

1. All statements of the defendant after the invocation of her 5th amendment right to counsel on January 22 were taken in violation of Defendant's 5th amendment rights and are inadmissible.

2. All evidence obtained as a result of statements of the Defendant after January 22 was obtained in violation of Defendant's 5th amendment rights and is inadmissible.

ORDERS OF THE COURT

It is therefore ORDERED, ADJUDGED AND DECREED that all statements the Defendant made during the interrogation of January 22, 1996 and during all interrogations thereafter be, and they are hereby, suppressed.

It is therefore ORDERED, ADJUDGED AND DECREED that all evidence obtained as a result of statements of the Defendant after she invoked her right to counsel on January 22, 1996 be, and is hereby, suppressed.

Signed this 27th day of June, 1996.

/s/ Peter S. Peca, Jr.
PETER S. PECA, JR., JUDGE

IN THE DISTRICT COURT OF
EL PASO COUNTY TEXAS
171ST JUDICIAL DISTRICT

THE STATE OF TEXAS

V. NO: 960D03837

HEIDI SCHRAMM CONSAUL (Filed July 2, 1996)

SUPPLEMENTAL FINDINGS TO
ORDER ON DEFENDANT'S MOTION TO SUPPRESS
ORAL AND WRITTEN STATEMENTS OF ACCUSED
AND EVIDENCE OBTAINED AS A RESULT THEREOF

On the 21st day of June, 1996, the above captioned matter came on for hearing before the Court pursuant to Article 38.22 Texas Code of Criminal Procedure, and the Court, after hearing the evidence at that hearing as well as reviewing the evidence offered at the hearing to reduce bond before the Jail Magistrate on February 8 & 9, 1996, viewing the video tapes and other exhibits, and having considered the argument of counsel, made Findings of Fact, Conclusions of Law, and Orders herein on June 27th 1996. Thereupon, the State, feeling it had been denied the right to present relevant evidence, made a request to make a Bill of evidence it would have presented if allowed, which request was granted by the Court. The State made its Bill on July 1, 1996 in the presence of the Defendant and her attorney in a proceeding presided over by the Court. After the State had concluded its Bill, the Court, having heard all the additional evidence offered, stated it would consider such evidence and, having considered it, was still of the opinion that its prior Conclusions of Law and Orders issued on June 27, 1996

were proper, however, the Court felt compelled to make the following Additional Findings of Fact.

ADDITIONAL FINDINGS OF FACT:

1. The investigation had focused on the accused at the time of the interrogation of January 22, 1996. The Sheriff's Deputies repeatedly stated to the Defendant that they did not believe her and that she alone or acting in concert with another had to be responsible for the disappearance of the child. The Deputies testimony that they were merely investigating a reported kidnapping is belied by the first statement to the Defendant by Deputy Reuter after he advised her of her Sheriff's Department Warnings; Captain Gabbert's final exchange with Defendant; and the conclusion of the interrogation during which Defendant invokes her *Miranda* right to counsel five times before the interrogation ceases, all of which are attached as an exhibit hereto.

2. That the Defendant attempted to reassert her *Miranda* right to counsel to Deputy Cook on the morning of January 24 when he took her back into custody.

3. That on January 24th Deputy Cook advised Defendant to address her request for counsel to Deputy Reuter.

4. That Deputy Cook delivered Defendant to Deputy Reuter the offices of the El Paso County Sheriff's Department on January 24th.

Signed this 2nd day of July, 1996.

/s/ Peter S. Peca, Jr.
PETER S. PECA, JR., JUDGE

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

September 10, 1997
COA#: 08-96-00343-CR

RE: Case No. 0832-97

STYLE: STATE OF TEXAS V. CONSAUL, HEIDI SCHRAMM

[SEAL]

On this day, the State's Petition for Discretionary Review has been GRANTED. An original and eleven copies of the State's brief must be filed with this Court within 30 days. The appellant's brief is due 30 days after the timely filing of the State's brief.

(ORAL ARGUMENT PERMITTED) Troy C. Bennett, Jr., Clerk

JAIME ESPARZA
DISTRICT ATTORNEY 34 J D
500 E SAN ANTONIO SUITE 201
EL PASO TX 79901

[SEAL]

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. 832-97

THE STATE OF TEXAS

v.

HEIDI SCHRAMM CONSAUL, Appellee

ON STATE'S PETITION FOR DISCRETIONARY
REVIEW FROM THE EIGHTH
COURT OF APPEALS
EL PASO COUNTY

Delivered PER CURIAM. PRICE, J., *filed a concurring opinion, in which* BAIRD, OVERSTREET *and* MEYERS, JJ., *joined.* KELLER, J., *filed a dissenting opinion, in which* MCCORMICK, P.J., *and* MANSFIELD *and* KELLER, JJ., *joined.*

OPINION

Appellee was charged with capital murder, for the death of her 18 month old daughter. After making statements to the police, appellee claimed, on a pre-trial motion, that the statements she made were obtained in violation of her Fifth and Fourteenth Amendment rights. As a result, she argued that they should be suppressed. The trial court granted appellee's motion, and the State appealed. The Court of Appeals affirmed the trial court.

State v. Consaul, 960 S.W.2d 680 (Tex. App.-El Paso 1997, pet. granted).

The State appealed, and we granted petitions for discretionary review filed by both the State Prosecuting Attorney and the District Attorney. However, after careful review of the appellate record, the Court of Appeals' opinion and the briefs and oral arguments before this Court, we conclude that our decision to grant review was improvident. *See* TEX. R. APP. P. 69.3. Accordingly, the State's petitions are dismissed. Just as in any case where this Court refuses to grant a petition for discretionary review, our decision to dismiss the State's petitions as improvidently granted should not be construed as approval of the Court of Appeals' opinion. *Hensarling v. State*, 829 S.W.2d 168, 169 (Tex. Crim. App. 1992); *Walker v. State*, 811 S.W.2d 131, 131 (Tex. Crim. App. 1991).

PER CURIAM

Date Delivered: Nov. 25, 1998

En Banc

Publish

[SEAL]

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. 832-97

THE STATE OF TEXAS

v.

HEIDI SCHRAMM CONSAUL, Appellee

ON STATE'S PETITIONS FOR DISCRETIONARY
REVIEW FROM THE EIGHTH
COURT OF APPEALS
EL PASO COUNTY

CONCURRING OPINION

I concur in the decision to dismiss the petitions as improvidently granted. I write separately to explain my reasons for doing so.

Appellee was charged with capital murder, for the death of her 18 month old daughter. Initially, appellee contacted the police on January 22, 1996, reporting that her child was kidnaped. She was subsequently interviewed by the police at the police station that same day. Appellee later went home, and was re-interviewed by police on January 24, 1996, as well as by FBI agents. She took a polygraph test then, and was told that the results of the test demonstrated deception. Later that day, she

made statements concerning the death of her child, maintaining that the child had fallen out of her crib, had suffocated on a plastic bag, and that appellee had taken the body to the desert and left it there. The police found the child's body in the desert, and appellee later gave a written statement to the police.

On pre-trial motion, appellee claimed that the January 22 interview was custodial. She argued that she had unequivocally invoked her right to counsel, but that her request was ignored and her interrogation continued in violation of her Fifth and Fourteenth Amendment rights. As a result, appellee argued that the statements she made after she invoked her right to counsel should be suppressed. The trial court granted appellee's motion, and the State appealed.

Although the issue of appellee's invocation of the right to counsel on January 22 and its relationship to the statements made by appellee on January 24 appear to be pivotal, the State did not argue this point to either the trial court or the Court of Appeals. Instead, it apparently assumed that if the January 22 interview was custodial and appellee did invoke her right to counsel at that time, then the invocation was valid as well for the interview on January 24, unless appellee reinitiated contact with the police and so waived her right to counsel. Thus, the State argued only that the January 22 interview was not custodial, and that as such, appellee's statements of January 24 were validly obtained or, alternatively, that if the interview was custodial, then appellee reinitiated contact with the police and so waived her right to counsel. The Court of Appeals affirmed the pre-trial order, holding that the trial court had not abused its discretion in finding that

the January 22 interrogation was custodial in nature. *State v. Consaul*, 960 S.W.2d 680, 687 (Tex. App.-El Paso 1997, pet. granted). It further found that the trial court was warranted in finding that appellee had unequivocally invoked her right to counsel at that interview; that there was some evidence that law enforcement officers, and not appellee, had reinitiated contact to take the polygraph; and that law enforcement officers, and not appellee, reinitiated contact by asking appellee if she wanted to make a statement after knowing that she had invoked her right to counsel. *Id.* at 687-688.

The State appealed, and the State Prosecuting Attorney and the District Attorney filed separate petitions for discretionary review. Of the grounds presented by the petitions, the most potentially meritorious were those from the State Prosecuting Attorney: (1) Does the rule of *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed.2d 378 (1981) apply retrospectively when there is a break in the period of custody in which the accused invokes his fifth amendment right to counsel? (2) Can the Fifth Amendment Right to Counsel be invoked anticipatorily, in a context other than custodial interrogation?

In *Edwards*, the Supreme Court held that once an accused has asserted his right to counsel, the police may not further interrogate him until counsel has been made available to him, unless the accused himself initiates further communication with the police. *Id.* at 484-485, 101 S. Ct. at 1885. While never directly answering the question of how a break in custody might affect an *Edwards* claim,

the Court later appeared to suggest that such an additional fact might lead to a different result.[1] Although the Supreme Court has never ruled definitively on this issue, a number of courts around the country have found, in various scenarios, that the *Edwards* rule is inapplicable when there has been a break in custody.[2]

---

[1] In *McNeil v. Wisconsin*, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed.2d 158 (1991), when discussing its previous case law, the Court made the following statement:

> In *Edwards v. Arizona*, . . . we established a second layer of prophylaxis for the *Miranda* right to counsel: Once a suspect asserts the right not only must the current interrogation cease, but he may not be approached for further interrogation 'until counsel has been made available to him,' . . . If the police do subsequently initiate an encounter in the absence of counsel (*assuming there has been no break in custody*), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.

McNeil v. Wisconsin, 501 U.S. at 176-177, 111 S. Ct. at 2208 (emphasis added and citations omitted).

[2] *See United States v. Barlow*, 41 F.3d 935-945-946 (5th Cir. 1994), *cert. denied*, 514 U.S. 1030, 115 S. Ct. 1389, 131 L. Ed.2d 241 (1995), *and cert. denied sub nom. Lebaron v. United States*, 514 U.S. 1087, 115 S. Ct. 1804, 131 L. Ed.2d 730 (1995); *United States v. Hines*, 963 F.2d 255, 256-257 (9th Cir. 1992); *Dunkins v. Thigpen*, 854 F.2d 394, 397-398 (11th Cir. 1988), *cert. denied*, 489 U.S. 1059, 109 S. Ct. 1329, 103 L. Ed.2d 597 (1989); *McFadden v. Garraghty*, 820 F.2d 654, 661 (4th Cir. 1987); *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 125 (7th Cir. 1987), *cert. denied*, 483 U.S. 1010, 107 S. Ct. 3240, 97 L. Ed.2d 745 (1987); *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982), *cert. denied*, 463 U.S. 1229, 103 S. Ct. 3569, 77 L. Ed.2d 1410 (1983); *United States v.*

Unfortunately, however, as noted above, the State made no argument to either the trial court or the Court of Appeals as to the issue of the invocation of counsel on January 22, the statements made on January 24, and the break in custody between those two dates.[3] Since the

---

Drake, 934 F. Supp. 953, 962 (N.D. Ill. 1996); *United States v. Garey*, 813 F. Supp. 1069, 1073 (D. Vt. 1993), *affd*, 19 F.3d 8 (2th Cir. 1994); *People v. Scaffidi*, 15 Cal. Rptr. 2d 167, 170-171 (Cal. App. 4th Dist. 1922, review denied); *People v. Trujillo*, 773 P.2d 1086, 1091-1092 (Colo. 1989); *Gonzalez v. State*, 449 So.2d 882, 886 (Fla. App. 3rd Dist. 1984), *petition for review denied*, 458 So.2d 274 (Fla. 1984); *Keys v. State*, 606 So.2d 669, 671-672 (Fla. App. 1st Dist. 1992); *State v. Bymes*, 375 S.E.2d 41, 41-42 (Ga. 1989); *Wilson v. State*, 444 S.E.2d 306, 309 (Ga. 1994), *cert. denied*, 513 U.S. 988, 115 S. Ct. 486, 130 L. Ed.2d 398 (1994); *State v. Norris*, 768 P.2d 296, 301-302 (Kan. 1989); *State in Interest of Wells*, 532 So.2d 191, 195-197 (La. App. 3rd Cir. 1988); *Commonwealth v. Galford*, 597 N.E.2d 410, 413-414 (Mass. 1992), *cert. denied*, 506 U.S. 1065, 113 S. Ct. 1010, 122 L. Ed.2d 158 (1993); *Willie v. State*, 585 So.2d 660, 666-667 (Miss. 1991); *State v. Kyger*, 787 S.W.2d 13, 24-25 (Tenn. Crim. App. 1989); *State v. Furlough*, 797 S.W.2d 631, 640-641 (Tenn. Crim. App. 1990); *Tipton v. Commonwealth*, 447 S.E.2d 539, 540-541 (Va. App. 1994); *State v. McKenzie*, 475 S.E.2d 521, 529-530 (W. Va. 1996), *cert. denied*, ___ U.S. ___ 117 S. Ct. 529, 136 L. Ed.2d 415 (1996).

[3] Specifically, in its brief to the Court of Appeals, the State argued the following grounds, regarding appellee's Fifth Amendment rights:

(I) Because there was no Fifth Amendment violation, the trial court erred in granting appellee's motion to suppress all oral and written statements and evidence derived therefrom.

(A) The January 22, 1996 interview did not amount to custodial interrogation under the Fifth Amendment.

(B) Because appellee was not in custody, appellee was not entitled to *Miranda* protections.

State made no argument regarding the issue of *Edwards* and the break in custody, the Court of Appeals neither considered nor ruled on that issue.[4]

This court's jurisdiction is limited to review of decisions by the courts of appeals. TEX. R. APP. P. 66.1 (West 1997) provides that:

(C) Appellee's oral statement was given freely and voluntarily.

(D) The Sheriff's deputies acted properly following appellee's attempted invocation of right to counsel during the January 22, 1996 interview.

(1) Appellee terminated the interview and went home.

(2) Appellee initiated contact with law enforcement personnel to report a crime she knew she would be suspected of.

(3) The officers did not develop probable cause to arrest appellee until she disclosed the location of her child's body.

(E) Even if appellee invoked her right to an attorney on January 22, 1996, at a time when she was entitled to the same, any subsequent statement and resulting evidence was admissible in light of appellee's repeated requests for law enforcement assistance and appellee's unsolicited statements to the officers regarding the polygraph examination which amounted to reinitiation of contact under *Edwards*.

(F) Appellee made a knowing, voluntary and intelligent waiver of her rights following the January 22, 1996 interview.

[4] Nor could the Court of Appeals have properly ruled on such issue. *See Mercado v. State*, 972 S.W.2d 75, 78 (Tex. Crim. App. 1998) (per curiam) (in cases in which the State is the party appealing, the basic principle of appellate jurisprudence that points not argued at trial are deemed to be waived applies to the State as well as to the defense).

> The Court of Criminal Appeals may review a *court of appeals' decision* in a criminal case on its own initiative under Rule 67 or on the petition of a party under Rule 68 (emphasis added).

As we have repeatedly stated, "This court reviews only 'decisions' of the courts of appeals; we do not reach the merits of any party's contention when it has not been addressed by the lower appellate court. *Sotelo v. State*, 913 S.W.2d 507, 509 (Tex. Crim. App. 1995).[5]

Furthermore, it is notable that in the State Prosecuting Attorney's petition for discretionary review, while discussing the *Edwards*/break in custody issue, the State never once refers to the Court of Appeals' decision regarding this issue, except to note that the Court of Appeals neither considered nor discussed the issue of the break in custody; this, of course was done for good reason, since the issue was never argued to the Court of Appeals. As this Court has stated, " . . . the portion of the petition designated 'Reasons for Review' should specifically address the court of appeals opinion and its effect on our jurisprudence . . . A discussion of principles of law, without reference to the holding of the court of appeals, will usually be insufficient to persuade this Court to exercise its discretionary jurisdiction." *Degrate v. State*, 712 S.W.2d 755, 756-757 (Tex. Crim. App. 1986) (per curiam).

---

[5] *See also Whatley v. State*, 946 S.W.2d 73, 76 n.6 (Tex. Crim. App. 1997); *Davis v. State*, 870 S.W.2d 43, 47 (Tex. Crim. App. 1994); *Farrell v. State*, 864 S.W.2d 501, 502 (Tex. Crim. App. 1993); *Ward v. State*, 829 S.W.2d 787, 795-796 (Tex. Crim. App. 1992); *Tallant v. State*, 742 S.W.2d 292, 294 (Tex. Crim. App. 1987).

The dissent cites *Klima v. State*, 934 S.W.2d 109 (Tex. Crim. App. 1996), as authority for the proposition that we should review the instant case, although the State never advanced the argument it is now making to either the trial court or the Court of Appeals. *Post*, at ___ (slip op. at 2-3). However, *Klima* is inapplicable for two reasons. First, it dealt specifically with and was limited to a situation in which standing to challenge a search under the Fourth and Fourteenth Amendments is raised for the first time on appeal. As we stated,

> By raising the issue of standing for the first time on appeal, *the State did not raise a new issue.* Rather, it challenged the trial court's holding that appellee met her burden of establishing that the government violated her reasonable expectation of privacy . . . *Appellee was on notice that it was her obligation to allege and prove standing, as standing was an element of her Fourth Amendment claim.*

Id. at 111 (citations omitted and emphasis added). The dissent also cites *Mercado v. State* as support for its position (*post*, at ___) (slip op. at 2), but fails to acknowledge that we specifically stated in *Mercado* that the *Klima* line of cases was limited to the issue of standing. *Mercado*, 972 S.W.2d at 78. In contrast to *Klima*, the issue the State wishes to raise in the present case has nothing to do with the issue of standing. Instead, the State is raising a completely new issue, and appellee had no notice in either the trial court or the Court of Appeals of this new issue. As noted above, this Court reviews only decisions of the courts of appeals and we do not reach issues that have not been addressed by the lower appellate court. *Klima* was not an exception to this rule, since standing was an

element of the claim the defendant in that case was making. The same cannot be said of the argument that the State makes before us in today's case. Also, *Klima* dealt specifically with a situation in which the State made the standing argument for the first time to the Court of Appeals, when it had not made that argument to the trial court. *Klima*, 934 S.W.2d at 111-112. Here, however, the State is attempting to bring before this Court an issue that it has failed to present to either the trial court or the Court of Appeals. Again, it should be reiterated that this Court reviews decisions of the courts of appeals. Because the *Edwards*/break in custody issue was never heard by the Court of Appeals, and because the decision by that Court in no way implicates that issue, it is not properly before us today. Therefore, despite the assertions of the dissent (*post*, at ___) (slip op. at 2), the issue brought by the State today has been procedurally defaulted.

Finally, the dissent asserts that we should decide the *Edwards*/break in custody issue because it is "an important one and one of first impression in this state," and because we granted review on this issue, received briefs, and heard oral arguments. *Post*, at ___ (slip op. at 2). However, these are not, in and of themselves, sufficient justifications for deciding an issue. On numerous occasions, we have granted petitions, received briefs, heard oral arguments, and then after careful consideration, we have dismissed those petitions as improvidently granted.[6] As well, even when an issue may be considered

---

[6] *See, e.g., Cox v. State*, 951 S.W.2d 5 (Tex. Crim. App. 1997); *Fox v. State*, 930 S.W.2d 607 (Tex. Crim. App. 1996) (per curiam); *Teer v. State*, 923 S.W.2d 11 (Tex. Crim. App. 1996) (per curiam);

"important," that does not necessarily justify deciding it when the case is not in the appropriate procedural posture for deciding that issue.[7] Although the State's petition may present an important issue, the case before us today does not do so.

Thus, since there is nothing for this Court to review with regard to the issue of *Edwards* and the break in custody, it is proper that we dismiss the State Prosecuting

---

Ex parte Ramirez, 919 S.W.2d 435 (Tex. Crim. App. 1996); *Mavins v. State*, 908 S.W.2d 462 (Tex. Crim. App. 1995) (per curiam).

[7] *See, e.g., Adams v. Robertson*, ___ U.S. ___, 117 S. Ct. 1028, 137 L. Ed.2d 203 (1997) (per curiam) (in class action against health insurer for fraud, writ of certiorari, was dismissed as improvidently granted, since federal constitutional issue was never presented to state Supreme Court); *California v. Rooney*, 483 U.S. 307, 107 S. Ct. 2852, 97 L. Ed.2d 258 (1987) (per curiam) (writ of certiorari dismissed as improvidently granted where certiorari was granted to decide issue of whether defendant retained expectation of privacy in bag placed in communal trash bin of multi-unit apartment building, but this issue had never been subject of actual judgment); *Ramsey v. New York*, 440 U.S. 444, 99 S. Ct. 1415, 59 L. Ed.2d 440 (1979) (per curiam) (writ of certiorari dismissed as improvidently granted in case concerning involuntary plea, where record in case cannot be said to have actually presented question framed in petition for certiorari); *Belcher v. Stengel*, 429 U.S. 118, 97 S. Ct. 514, 50 L. Ed.2d 269 (1976) (per curiam) (in case concerning 42 U.S.C. § 1983, where question framed in petition for certiorari is not in fact presented by record, writ of certiorari should be dismissed as improvidently granted); *McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16, 92 S. Ct. 170, 30 L. Ed.2d 136 (1971) (per curiam) (where record did not adequately present question framed in petition for certiorari concerning Longshoremen's and Harbor Workers' Compensation Act, writ of certiorari would be dismissed as improvidently granted).

Attorney's grounds for review, as improvidently granted. Therefore, I concur in the dismissal.

Price, J.

Date Delivered: November 25, 1998

Publish

BAIRD, OVERSTREET AND MEYERS, JJ., *join.*

[SEAL]

THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. 832-97

HEIDI SCHRAMM CONSAUL, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITIONS FOR DISCRETIONARY
REVIEW FROM THE EIGHTH
COURT OF APPEALS
EL PASO COUNTY

DISSENTING OPINION

Appellee was interrogated by law enforcement officials, while in custody after being given *Miranda*[1] warnings, until she invoked her right to counsel. The interrogation subsequently ceased, and appellee was later released from custody and permitted to return to her home. Two days later, law enforcement officials reinitiated questioning and obtained incriminating statements. Holding that the police had violated the *Edwards*'[2] rule against reinitiating conversations after a suspect's invocation of her right to counsel under *Miranda*, the trial court

---

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] *Edwards v. Arizona*, 451 U.S. 477 (1981).

suppressed the statements. The State appealed the trial court's ruling, and the Court of Appeals affirmed.

One of the grounds for review that we granted concerned whether the *Edwards'* reinitiation rule applied to police initiation of questioning *after a break in custody.* The State did not advance this legal argument before the trial court or the court of appeals, and that failure may well be the reason the majority dismisses the, State's petitions as improvidently granted. Nevertheless, I believe we should address this ground.

We have held recently that the State may procedurally default grounds for upholding a search when those grounds are not articulated to the trial court. *State v. Mercado,* 972 S.W.2d 75 (Tex. Crim. App. 1998). In that case, the State urged at trial that the search fell within the inventory search exception to the warrant and probable cause requirements of the Fourth Amendment. *Id.* at 76. The trial court ruled against the State. *Id.* On appeal, the State argued that the search was proper as a search incident to arrest. *Id.* We held that the State procedurally defaulted this legal theory for upholding the search by failing to advance it before the trial court. *Id.* at 78. In so holding, we distinguished *State v. Klima,* 934 S.W.2d 109 (Tex. Crim. App. 1996), which held that a person's standing to attack the validity of a search could be challenged by the State for the first time on appeal. *Mercado,* 972 S.W.2d at 77-78. We explained that the defendant bears the burden of establishing his expectation of privacy, but that once the defendant has met that burden, the government must establish the validity of the search under Fourth Amendment law. *Id.* at 78. But because standing is part of the defendant's burden in initially establishing a

Fourth Amendment claim, the State could raise the issue on appeal even though not raised by the State in the trial court. *Id.*

The present case falls within the rule announced in *Klima*. As with the defendant who must show that the Fourth Amendment is implicated by showing a reasonable expectation of privacy, appellee must show that *Miranda* is implicated by showing the existence of a relevant custodial setting. Hence, whether a break in custody occurred is an issue that falls within the proof requirements for establishing an *Edwards/Miranda* claim. Therefore, the State did not procedurally default this question by failing to raise it in the trial court.

And, while we may decline to review an issue presented in a State's petition for discretionary review on the ground that the issue was not addressed by the Court of Appeals, we also have discretion to address such an issue, as long as it was not procedurally defaulted in the trial court. The issue in the present case is an important one and one of first impression in this state. The Supreme Court has indicated that the protections in *Edwards* are not implicated when there has been a break in custody. *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991). Having granted review on this issue, received briefs, and heard

oral arguments, I believe this Court should address the issue.

Hence, I respectfully dissent.

KELLER, J.

DATE DELIVERED: November 25, 1998
PUBLISH

McCormick, P.J., and Mansfield and Holland, JJ., joined.

[SEAL]
COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS,	§	No. 08-96-00343-CR
	§	Appeal from the
	§	171st District Court
Appellant,	§	of El Paso County,
	§	Texas
v.	§	
	§	(TC# 96-D03837)
HEIDI SCHRAMM CONSAUL,	§	
	§	
Appellant.	§	

ORDER

The Appellant's Motion to Stay Mandate having been duly considered, and being of the opinion that the same should be granted; It is ORDERED that said Motion be and it is hereby granted.

IT IS SO ORDERED THIS 3RD DAY OF MARCH, 1999.

/s/ Richard Barajas
Richard Barajas, Chief Justice

Before Panel No. 2
Barajas, C.J., McClure, and Chew, JJ.

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

February 3, 1999
COA#: 08-96-00343-CR

RE: Case No. 0832-97

STYLE: STATE OF TEXAS V. CONSAUL, HEIDI SCHRAMM

[SEAL]

On this day, the State's Motion for Rehearing was denied.

(JUDGE KELLER WOULD GRANT) Troy C. Bennett, Jr., Clerk

JAIME ESPARZA
DISTRICT ATTORNEY 34 J D
500 E SAN ANTONIO SUITE 201
EL PASO TX 79901

VERNON'S TEXAS STATUTES AND CODES
ANNOTATED CODE OF CRIMINAL PROCEDURE
PART I – CODE OF CRIMINAL PROCEDURE OF 1965
TRIAL AND ITS INCIDENTS
CHAPTER THIRTY-EIGHT – EVIDENCE IN CRIMINAL ACTIONS

Copr. © West Group 1998. All rights reserved.

Current through End of 1997 Reg. Sess.

Art. 38.22 [727] [810] [790] When statements may be used

Sec. 1. In this article, a written statement of an accused means a statement signed by the accused or a statement made by the accused in his own handwriting or, if the accused is unable to write, a statement bearing his mark, when the mark has been witnessed by a person other than a peace officer.

Sec. 2. No written statement made by an accused as a result of custodial interrogation is admissible as evidence against him in any criminal proceeding unless it is shown on the face of the statement that:

(a) the accused, prior to making the statement, either received from a magistrate the warning provided in Article 15.17 of this code or received from the person to whom the statement is made a warning that:

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;

(2) any statement he makes may be used as evidence against him in court;

(3) he has the right to have a lawyer present to advise him prior to and during any questioning;

(4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview at any time; and

(b) the accused, prior to and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights set out in the warning prescribed by Subsection (a) of this section.

Sec. 3. (a) No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:

(1) an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement;

(2) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;

(3) the recording device was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;

(4) all voices on the recording are identified; and

(5) not later than the 20th day before the date of the proceeding, the attorney representing the defendant is provided with a true, complete, and accurate copy of all recordings of the defendant made under this article.

(b) Every electronic recording of any statement made by an accused during a custodial interrogation must be preserved until such time as the defendant's conviction for any offense relating thereto is final, all direct appeals therefrom are exhausted, or the prosecution of such offenses is barred by law.

(c) Subsection (a) of this section shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed.

(d) If the accused is a deaf person, the accused's statement under Section 2 or Section 3(a) of this article is not admissible against the accused unless the warning in Section 2 of this article is interpreted to the deaf person by an interpreter who is qualified and sworn as provided in Article 38.31 of this code.

(e) The courts of this state shall strictly construe Subsection (a) of this section and may not interpret Subsection (a) as making admissible a statement unless all requirements of the subsection have been satisfied by the state, except that:

(1) only voices that are material are identified; and

(2) the accused was given the warning in Subsection (a) of Section 2 above or its fully effective equivalent.

Sec. 4. When any statement, the admissibility of which is covered by this article, is sought to be used in connection with an official proceeding, any person who swears falsely to facts and circumstances which, if true, would render the statement admissible under this article is presumed to have acted with intent to deceive and with knowledge of the statement's meaning for the purpose of prosecution for aggravated perjury under Section 37.03 of the Penal Code. No person prosecuted under this subsection shall be eligible for probation.

Sec. 5. Nothing in this article precludes the admission of a statement made by the accused in open court at his trial, before a grand jury, or at an examining trial in compliance with Article 16.03 and 16.04 of this code, or of a statement that is the res gestae of the arrest or of the offense, or of a statement that does not stem from custodial interrogation, or of a voluntary statement, whether or not the result of custodial interrogation, that has a bearing upon the credibility of the accused as a witness, or of any other statement that may be admissible under law.

Sec. 6. In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions. If the statement has been found to have been voluntarily made and held admissible as a matter of law and fact by the court in a hearing in the absence of the jury, the court must enter an order stating its conclusion as to whether or not the statement was voluntarily made, along with the specific finding of facts upon which the conclusion was based, which order shall be filed

among the papers of the cause. Such order shall not be exhibited to the jury nor the finding thereof made known to the jury in any manner. Upon the finding by the judge as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof. In any case where a motion to suppress the statement has been filed and evidence has been submitted to the court on this issue, the court within its discretion may reconsider such evidence in his finding that the statement was voluntarily made and the same evidence submitted to the court at the hearing on the motion to suppress shall be made a part of the record the same as if it were being presented at the time of trial. However, the state or the defendant shall be entitled to present any new evidence on the issue of the voluntariness of the statement prior to the court's final ruling and order stating its findings.

Sec. 7. When the issue is raised by the evidence, the trial judge shall appropriately instruct the jury, generally, on the law pertaining to such statement.

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.